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IN THE

Supreme Court of the United States

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FILED
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October Term, 1979.

No. [redacted]

FLOYD JOSIAH,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on October 17, 1979, affirming the judgment of the District Court of the Virgin Islands denying petitioner's motion to dismiss information on the grounds of double jeopardy.

OPINIONS BELOW.

The judgment order of the Third Circuit Court of Appeals was entered October 17, 1979 without comment. (Pet. App. A).

JURISDICTION.

The judgment order of the court of appeals was entered on October 17, 1979. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

> Whether a trial court's sua sponte severance is permitted under the Federal Rules of Criminal Procedure and whether the trial court's sua sponte midtrial severance because of evidentiary problems with a multidefendant trial gives rise to the kind of "manifest necessity" for the declaration of severance that will avoid a valid plea of double jeopardy.

In answering this question, we assign as error the action of the United States Court of Appeals for the Third Circuit in affirming the judgment of the District Court of the Virgin Islands when petitioner's constitutional protection against double jeopardy was violated when the trial court, sua sponte, without request and/or consent of petitioner, ordered a midtrial severance because of "evidentiary problems" which were "due to rules of evidence" and "multi-defendant trial," and when such sua sponte severance is not permitted under the Federal Rules of Criminal Procedure.

SUMMARY STATEMENT.

Floyd Josiah was arrested pursuant to a bench warrant on or about May 1, 1979. Arraignment was held on May 2, 1979, at which time the prosecution moved for a joint trial.

Pre-trial motions for severance were filed by co-defendants Barnes, Rivera and Serrano. (App. C-D-E).

Petitioner Josiah did not file any pre-trial motion for severance pursuant to Rule 12 of the Federal Rules of Criminal Procedure. Prosecution did not file any written reply in opposition to co-defendants' motions for severance, although opposing severance.

Prosecution made demand for notice of alibi. Record and docket entries show that some of the defendants filed "Notice of Alibi Defense" with names and addresses of witnesses upon whom defendants intended to rely to establish such alibis.

The joint trial was scheduled for June 18, 1979. Prior to selection of the jury on June 18, 1979, the Court held an in-chambers hearing with prosecution and defense attorneys. The Court considered defense motion to quash information. In opposition to motion to quash the information, prosecutor stated for the record that the information stands on its own; that the motion is frivolous; that informant Jacobs' reliability does not belong in the affidavit; and that witness Barry's testimony alone would permit the case to go to the jury. (Trial Tr., p. 4). The Court denied the motion to quash, stating that the affidavit is sufficient and that the Court disagrees with cases regarding arrest and search warrants. (Trial Tr. p. 14).

The *Bruton* problem was considered and discussed in chambers because of the multiple defendants, and motions made for severance by three co-defendants were heard by the Court. Prosecution informed the Court that it opposed severance and that the foreseeable *Bruton* problem was resolved. The prosecution assured the Court and all defense counsel that the prosecution has worked with all the witnesses and that no co-defendant's name would be mentioned and/or referred to. The Court granted severance to co-defendant Serrano, but denied severance to the other co-defendants who filed pre-trial motions for severance. Petitioner did not move for severance.

Subsequently, the jury was selected on June 18, 1979. The trial commenced on June 19, 1979, and the Government called approximately eleven (11) witnesses before calling Clan Jacobs as its witness on June 20, 1979. During the time of the alleged offenses, witness Clan Jacobs was employed by the Government of the Virgin Islands as a prison guard and also worked as an undercover paid informer. During the course of direct examination by the Government, Jacobs testified as follows—(Trial Tr. p. 197):

> Q. What was the nature of the conversation?
>
> A. It was, I asked him (Barnes) why did he run when he (Barnes) saw both detectives Carlos Rodriguez and Farrelly passing by, and he (Barnes) states because they are looking for him (Barnes) pertaining to the question of the Luis Golden killing, so I asked him (Barnes) if he (Barnes) was involved in the killing and he (Barnes) said I (Barnes) iced Golden because he messed up some money and a C. B. radio and some marijuana that belongs to him and the three other defendants.

Defense counsel Johnson for Rivera objected and asked that the statement be stricken. The trial court overruled the objection and gave a requested cautionary instruction to the jury. The trial court also cautioned witness Jacobs not to repeat what he (Barnes) may have said about the co-defendants. Mistrial motion was denied by the court and trial proceeded. All this evidenced by the following (Trial Tr. p. 197-200):

> Q. What was the nature of that conversation?
>
> A. It was, I asked him why did he run when he saw both detectives Carlos Rodriguez and Farrelly passing by, and he stated because they are looking for him pertaining to the question of the Luis Golden killing, so I asked him if he was involved in the killing and he said, I iced Golden because he messed up some money and a CB radio and some marijuana that belongs to him and the three other defendants.
>
> Q. That he iced him?
>
> A. Yes, sir.
>
> MR. JOHNSON: Objection to that and ask it be stricken.
>
> THE COURT: Objection overruled.
>
> Q. (By Mr. Meyers) Mr. Jacobs, in your testimony, if I ask you a specific question with respect to a specific defendant, I don't want you to call any other name.
>
> Do you understand that?
>
> A. Yes.
>
> MR. JOHNSON: In that connection, since he already has, I think I am entitled to a direction to the jury.
>
> THE COURT: Yes, you are.
>
> MR. MEYERS: I missed that point.
>
> THE COURT: He is entitled to a preliminary instruction.
>
> The jury can receive that testimony only with regard to the person who spoke and not with regard to anyone else. That is evidence that is only admissible against that person who spoke, not anyone else.
>
> You may proceed.
>
> MR. MEYERS: Thank you, Your Honor.
>
> May I have a minute, please?
>
> THE COURT: Yes.

MR. MEYERS: Your Honor, at this time the Government respectfully requests a sidebar conference so that you can instruct Mr. Jacobs.

THE COURT: All right.

(Whereupon the following occurred at sidebar, out of the hearing of the jury)

THE COURT: Mr. Jacobs?

THE WITNESS: Yes, sir.

THE COURT: It is very important that any statement made by any of the accused can be used only pertaining to that accused, it is only admissible against that person who made the statement, he cannot jeopardize his co-defendants, so you cannot repeat what he may have said about his co-defendants.

Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: That is a very strong rule of evidence.

THE WITNESS: Yes, sir.

THE COURT: If you continue to use other names, I can't give cautionary instructions, I would just have to declare a mistrial, so you have got to remember that you don't mention any other names.

THE WITNESS: I will just state friends.

MR. MEYERS: Your Honor, we went through this last night, and he was to say friends.

Is that acceptable?

THE COURT: Just say other persons, but not his friends, that might be too close, just say other persons, some other guys, other persons or whatever it is, but you cannot mention or in any way refer to the other defendants in this case.

MR. JOHNSON: At this juncture the Defendant Rivera moves for a mistrial based upon a violation of the Bruton rule.

THE COURT: Do you want to answer?

MR. MEYERS: I think Your Honor, that the limiting instruction you gave right away cleared it up.

THE COURT: I hope it does, and I just will deny the motion for mistrial at this time.

MR. OCEAN: I will make the same motion, Your Honor.

THE COURT: But your man wasn't mentioned.

MR. OCEAN: But he mentioned all four friends.

THE COURT: I will deny it.

The trial continued with the direct examination of witness Jacobs by the government until the witness was yielded to the defense for cross-examination, at which time the trial court ordered a 20-minute recess. (Trial Tr. p. 212). During the recess, the trial court held another in-chambers conference. The court stated that Jacobs' reference to the other three defendants could be reversible error, and to save as much of the case as it can, the court severed the case against Josiah, Rios and Rivera and would continue the case against Barnes, alone.

In open court, the trial judge informed the jury that due to evidentiary problems because of this multidefendant trial, he has ruled to sever the trials of Josiah, Rios and Rivera. (Trial Tr. p. 223). The trial court also informed the jury that the trial will continue against Elmo Barnes because "he is headed number one of the defendants in the caption of the case." (Trial Tr. p. 224); but in

chambers the trial court stated, "I don't think there is a *Bruton* problem with Elmo Barnes, there may be with Geto's (Juan Rios') statement." (Trial Tr. p. 219).

There appears to be no formal on-the-record dismissal of the jury as to defendants Josiah, Rios and Rivera.

The second trial, before a different jury panel, was scheduled against Josiah, Rios and Rivera for August 6, 1979. Petitioner (Josiah) filed a motion to dismiss on the grounds of double jeopardy. The prosecution did not file any reply in opposition to the double jeopardy motion.

On July 30, 1979, the government filed a motion for re-joinder of co-defendant Serrano, and to try all defendants together on August 6, 1979. (App. F1).

The hearing on the double jeopardy motion was heard on August 1, 1979. The trial court stated that the testimony elicited from witness Jacobs *could be reversible error*, and severed the case. During the hearing, the court added that it hoped that witness Jacobs would testify differently the next time. On denying the motion the trial court stated that the motion was "frivolous" and that there is "no prejudice to defendant." (Motion Hearing Tr. p. 40-43). Trial court entered its order denying the Double Jeopardy Motion on August 1, 1979. (App. B1).

Defendant Josiah * appealed the trial court's order denying dismissal of the information on the grounds of double jeopardy to the United States Court of Appeals for the Third Circuit. The appellate court dispensed with oral argument and entered a judgment order without any comment.

The Third Circuit Court of Appeals affirmed the trial court's judgment on October 17, 1979. (App. A1).

* Co-defendants Juan Rios (No. 79-2044) and Luis Antonio Rivera (No. 79-2043) also appealed to the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE PETITION.

This case presents a question involving Constitutional protection against double jeopardy and procedural due process when a trial court disregarded Rule 12 of the Federal Rules of Criminal Procedure and sua sponte declared a midtrial severance. The petitioner did not move for severance under Rule 12, nor did petitioner consent to the trial court's sua sponte midtrial severance.

The midtrial severance was declared by the trial court on the third day of trial after the trial court concluded that a government witness's statement "could be reversible error" and because of evidentiary problems in a multi-defendant trial.

Petitioner was deprived of procedural due process by the trial court's sua sponte severance, which caused petitioner to be twice put in jeopardy in violation of the Double Jeopardy Clause of the Fifth Amendent.

The Supreme Court has considered many cases involving midtrial dismissals and mistrials. This case involves a midtrial sua sponte severance, and a severance is functionally distinguishable from a "dismissal" and "mistrial."

Petitioner Josiah did not file any pretrial motion for severance pursuant to Rule 12 of the Federal Rules of Criminal Procedure. Rule 12 provides that the motion for severance of defendants must be raised prior to trial, and failure to do so shall constitute waiver thereof.

Rule 12, Federal Rules of Criminal Procedure, provides:

> (a) * * *
>
> (b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the

discretion of the judge. The following must be raised prior to trial:

* * *

(5) Requests for a severance of charges or defendants under Rule 14.

* * *

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred it a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Rule 12 does not allow the trial court to declare a severance on its own, there must be a request for severance. Even if petitioner had made a request for severance, the court could have denied it as it did with co-defendants. The granting of a severance is not a matter of right, but rests in the discretion of the court (*United States v. Burke,* 495 F. 2d 1225; *United States v. Spinks,* 470 F. 2d 64); but before the court can exercise its discretion, a request for severance must be made. It is discretionary with the court to grant or to deny separate trial, *upon motion of either a defendant or the prosecutor,* and such ruling will

not be disturbed unless there has been an abuse of discretion. *Wharton's Criminal Procedure, Sec. 303, Severance, p. 155, et seq.* In *United States v. Parsen,* 452 F. 2d 1007, the court held that a motion for severance was waived when it was raised for the first time on morning set for trial. But, petitioner Josiah did not request severance before trial or during trial.

Prior to commencement of the trial, the prosecution team informed the trial judge that a *Bruton* problem was foreseeable and they assured the Court that all out-of-court statements were sanitized, and that the prosecution witnesses were fully advised and instructed not to mention a defendant's name and/or make reference to them. (Trial Tr. p. 15-20). When the trial was in "full swing" and nearing the end of the prosecution's case-in-chief on the third day of the trial, witness Clan Jacobs made reference to the "other defendants" in the case when he stated that "he (Barnes) said that he (Barnes) iced Golden because he messed up some money and a CB radio and some marijuana that belongs to him and the other three defendants."

Because of Jacobs' statement, the trial court severed the case stating that the statement raised a *Bruton* problem that could be cause for reversal. Did Jacobs' testimony really create a *Bruton* problem?

In *Bruton v. United States,* 391 U. S. 123, 88 S. Ct. 1620, co-defendants were convicted on a federal charge of armed postal robbery. A postal inspector testified that co-defendant Evans orally confessed to him that Evans and petitioner Bruton committed the armed robbery. Evans did not take the stand and Bruton thus was denied his Constitutional right of confrontation. Therefore, in *Bruton,* the co-defendant's statement inculpated Bruton in the crime as charged. Here, although Barnes' extra-judicial statement/confession did not inculpate Josiah in

the crimes as charged in the information, the trial judge instructed the jury that the statement is only admissible against that person who spoke and no one else. (Trial Tr. p. 198). There being no *Bruton* error, Josiah was not prejudiced by Barnes' statement. Yet, because of this single statement, the trial court aborted the trial by declaring a severance without Josiah's consent. This single evidentiary incident does not give rise to "manifest necessity."

The trial court's sua sponte midtrial declaration of severance in the first trial prohibits a second trial. This Court in *Arizona v. Washington*, 98 S. Ct. 824 at 829:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. (Footnote citations omitted.)

Most of the cases deal with situations where the courts ordered mistrials and not severances. However, here the trial was aborted before its completion by a severance of petitioner Josiah from the trial and continuation of the trial against defendant Barnes.

This Court in *Arizona* has established a stiff test for determining whether retrial can be had after a mistrial, by placing a "heavy burden" on the prosecution of demonstrating that there was "manifest necessity" to abort a trial. Shouldn't the prosecution have a heavier burden of demonstrating "manifest necessity" when the trial court, contrary to Rule 12 of the Federal Rules of Criminal Procedure, aborts a trial by declaring a severance. In *Crist v. Bretz*, 98 S. Ct. 2156 the Court, at page 2162, footnote 16, noted:

> The United States alternatively proposes a due process sliding 'interest balancing test' under which the further the trial has proceeded, the more the justification required for a midtrial termination.

In *Downum v. United States*, 372 U. S. 735, 83 S. Ct. 1033, the court stated:

> * * * there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent. The classic example is a mistrial because the jury is unable to agree. (citations) * * * Discovery by the judge during a trial that a member or members of the jury were biased pro or con one side has been held to warrant discharge of the jury and direction of a new trial. (citations). * * * when there is an imperious necessity to do so. (citations). Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. (citations). * * * But those extreme cases do not mark the limits of the guarantee. The *discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,'* to

use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' (citations)

* * *

We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion. (at page 738) (emphasis added)

The trial court also inferred that with multiple defendants evidentiary problems and circumstances arise that may confuse the jury. Here, the court was fully aware before trial that there were five (5) defendants; and after severance of Serrano, the remaining four to be tried together on June 18, 1979. The court was even apprised of the foreseeable problems and gave a cautionary instruction to the jury. In *Opper v. United States,* 75 S. Ct. 158, the petitioner complained that the jury might have become confused and improperly considered statements of a co-defendant in reaching its verdict as to petitioner. The court stated (at page 165):

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.

The trial court stated at the hearing on August 1, 1979 and in its Order dated August 1, 1979 (App. B1) that "At the time no objections were taken to the severance from the trial which was proceeded against defendant Elmo

Barnes alone." Josiah never moved for severance prior to trial or during trial. The trial court is inferring affirmative consent from Josiah's silence. However, affirmative consent may not be inferred from silence. *United States v. Grasso,* 552 F. 2d 46 reh. den. 568 F. 2d 899. Failure to object does not constitute waiver of defendant's right against double jeopardy. *People v. Brown,* 179 N. W. 2d 38.

In *Green v. United States,* 355 U. S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, the court stated the basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before verdict:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent, he may be found guilty. (at p. 187-188)

* * *

Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a *defendant is placed in jeopardy* once he is put to trial before a jury so that *if the jury is discharged without his consent* he cannot be tried again. (citations) (emphasis added) (at p. 188-189)

* * *

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. (at p. 198)

"The composition of a particular jury is crucial" to the defendant's interest, and the double jeopardy clause protects the defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter,* 336 U. S. at 689, 69 S. Ct. at 837. This "valued right" is now within the protection of the Constitutional guarantee against double jeopardy.

The court erred when it severed Josiah from the trial. Such court action during trial is contrary to Rule 12 of the Federal Rules of Criminal Procedure. The trial judge's response to the alleged *Bruton* error and action of severance was not warranted, and severance was not requested by Josiah or did he consent to severance. The judicial error took away Josiah's right to have his trial completed by the impaneled jury.

Here, the jury was discharged prematurely. The trial court had ample opportunity to further admonish the jury to disregard the testimony, and that the statement was not to be considered in establishing the guilt of defendant Josiah. Further, the court never considered any alternatives once it concluded that the statement elicited from Clan Jacobs was reversible error. The court, on its own, ordered severance, without any manifest necessity.

In *United States v. Dinitz,* 424 U. S. 600, the court stated:

> Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' United States v. Jorn, supra, at 484. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a sua sponte judicial declaration of mistrial.

Furthermore, defendant Barnes and others filed "notice of alibi-defense." Therefore, it was apparent from the record that Barnes would testify along with his witnesses to establish the alibi defense. Defendants would not have been deprived of their right of confrontation.

The prosecution gave its assurance that the foreseeable *Bruton* problems were resolved, and that extensive preparations were made to avoid any "out-of-court statement" problems. The defendant does not allege that the prosecution's conduct was deliberately designed to provoke stoppage of the trial against defendant Josiah, but it does appear that the prosecution's actions went beyond mere negligence. Josiah did not move for severance, but severance resulted from prosecution's actions. Defendant Serrano was severed prior to trial, but before the second trial was to commence on August 6, 1979, prosecution filed a motion to join defendant Serrano with defendants Josiah, Rios and Rivera. (App. E1). So what was accomplished by the discontinuance of the trial against Josiah? It would appear and could be inferred that the second trial will afford the prosecution a more favorable opportunity to convict defendant; but this second opportunity should be barred by the double jeopardy clause. *Divans v. California,* 434 U. S. 1303, 98 S. Ct. 1 (1977). If that be the case, prosecutorial overreaching is present. The trial court even stated that it hoped that witness Jacobs would testify differently at the next trial. In *Crist v. Bretz,* 98 S. Ct. 2156 at 2169 the court stated:

> As testimony commences, the evidence of the alleged criminal conduct is presented to the factfinder and becomes a matter of public record. The defendant's public embarrassment and anxiety begin. From this point on, retrial will mean repeating painful and embarrassing testimony, together with the possibility that the earlier 'trial run' will strengthen the prosecution's case. At a retrial, for example, prosecution witnesses may be better prepared for the rigors of cross-examination. Thus, the defendant has a strong interest in taking his case to the first jury, once witnesses testify. (citations omitted)

In *United States v. Martin*, 561 F. 2d 135, the prosecutor was cautioned by the court to exclude all irrelevant material from defendant's grand jury testimony that he planned to read to the jury. The prosecution failed to do this and read many prejudicial and irrelevant statements, causing defendant to move for a mistrial. The court held that prosecutorial overreaching in the reading of the grand jury testimony to the trial court gave appellant no choice except to move for mistrial and subject himself to the ordeal of another trial. The court concluded that defendant's (Martin's) Constitutional right not to be twice put in jeopardy had been violated. In our case, Josiah did not move for severance, the prosecution gave assurance that the foreseeable *Bruton* problems have been resolved, and the jury was discharged without Josiah's consent.

Here, the trial judge's severance sua sponte of the trial against Josiah was based on "multiple defendant problems" and "evidentiary rule problems." (Trial Tr. p. 223). Subsequently, the trial court denied Josiah's motion for dismissal of the second trial on grounds of double jeopardy, stating that motions were "frivolous, absolutely without merit in fact or in law" and that "they were being

made by the attorneys for the purpose of delay only." (App. B1). Are the court's reasons for ordering severance "very extraordinary and striking circumstances?" The Double Jeopardy Clause applies a strict standard: "The prohibition is not against being twice punished, but against being twice put in jeopardy." *United States v. Ball*, 163 U. S. 662, 16 S. Ct. 1192. Once a trial starts, jeopardy attaches and the prosecution must stand or fall on its performance at the trial. Should a citizen be required to run the gantlet twice because the trial court feels there may be reversible error, and feels that a multiple defendant trial creates evidentiary problems? Are these "very extraordinary and striking circumstances" to circumvent the policy of the Bill of Rights? The answer is "no." In *Downum* the court stated that any doubt must be resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary discretion." A defendant's right to continue with his trial should not be violated. Under the facts and circumstances of this case, a second trial is constitutionally impermissible.

The Third Circuit Court of Appeals affirmed the trial court without comment, but in *United States v. McKoy*, 591 F. 2d 218, the Third Circuit applied *Arizona v. Washington*, 434 U. S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717, as to the "heavy burden" and "manifest necessity." In *McKoy* the trial judge was concerned that defendant might attack the conviction on the ground of ineffective assistance of counsel if her trial counsel did not testify on a crucial matter and declared a mistrial. In addition to application of the *Arizona* test, the Third Circuit stated:

> In reviewing the decision of the trial court, our duty is to see that alternatives to declaring a mistrial were completely convassed. Citing *Dunkerley v. Hogan*, 579 F. 2d 141, 146-147; *United States v. Grasso*, 552

F. 2d 46; *United States v. Tinney,* 473 F. 2d 1085, cert. denied 412 U. S. 928, 93 S. Ct. 2752, 37 L. Ed. 2d 156.

> The record here does not reflect that termination of the trial by mistrial was justified by a 'manifest necessity' or was the only means by which the 'ends of public justice' could be fulfilled. *United States v. Perez,* 9 Wheat. (22 U. S.) 579, 580.

Here the trial court did not make any explicit finding of "manifest necessity" and the record does not reflect any "necessity" or the kind of "necessity" for declaration of severance that precludes a valid plea of double jeopardy.

The trial court and the government did not consider and/or canvass any alternatives to a declaration of severance so as to avoid a double jeopardy bar. The government has the heavy burden of demonstrating that the trial judge had no alternative to declaring a mistrial. *United States v. McKoy,* 591 F. 2d 218. Here, the government should also shoulder a heavier burden of demonstrating that the trial judge had no alternative to declaring a severance on the third day of the trial. The record reflects that the government opposed pre-trial motions for severance as filed by several defendants and prior to the second trial the government moved for re-joinder of defendant Serrano who was severed from the first trial.

The government called twelve witnesses but relied primarily on the testimony of Melvin Berry and Jacobs to obtain a conviction. The court declared a severance after the government yielded witness Jacobs to the defense, and government's case-in-chief was completed or nearly completed, there being no eye-witnesses to the alleged homicide and conspiracy charges. The record does not reflect evidence so overwhelming as to compel a jury verdict of guilty, and the trial court deprived defendant Josiah to

have the impaneled jury decide the case by declaring a severance.

The government and trial judge had prior knowledge that defendants' statements were to be put in evidence in this multidefendant trial; and also had prior knowledge that *Bruton* problems could occur but would not occur because the government witnesses were "coached" to avoid any *Bruton* problems.

Josiah claims that there was no *Bruton* problem, and even if the statement could be raised to a *Bruton* problem, it was not prejudicial; and the court's cautionary clear limiting instruction made it reasonably possible for the jury to follow, and at most could only be considered a harmless error.

Here double jeopardy attached when the trial judge declared a severance when there was no "manifest necessity," no request for severance, and no consent to severance by defendant Josiah, no demonstration by the government that the court had no alternative to declaration of severance, the record being void of any consideration of any alternative to severance, and the government and the court were aware of the problem prior to trial.

The prosecution has not met its heavy burden of demonstrating that there was "manifest necessity" to abort a trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

DATED this 15th day of November, 1979.

EDWARD J. OCEAN,
26 Company Street,
Christiansted, St. Croix,
U. S. Virgin Islands. 00820
Telephone: (809) 773-7903
Attorney for Petitioner.

Certificate of Service.

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari were mailed, postage fully prepaid, to the Solicitor General of the United States, Washington, D. C., this 26th day of November, 1979.

EDWARD J. OCEAN

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2032

GOVERNMENT OF THE VIRGIN ISLANDS

v.

FLOYD JOSIAH,

Appellant.

(Criminal No. 79-00049-02, District of Virgin Islands)
Division of St. Croix

Submitted Under Third Circuit Rule 12(6)
October 15, 1979

BEFORE: SEITZ, *Chief Judge*, GARTH and SLOVITER, *Circuit Judges.*

Judgment Order.

After considering the contention raised by the appellant, to-wit, that the trial court erred in denying defendant Josiah's motion to dismiss information on the grounds of double jeopardy, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

SEITZ
Chief Judge

Attest:
THOMAS F. QUINN
Clerk

DATED: October 17, 1979

APPENDIX B.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CRIMINAL NO. 79/49

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff

v.

FLOYD JOSIAH,
JUAN RIOS,
LUIS ANTONIO RIVERA,
Defendants

Order.

On July 30, 1979 (just one week before the scheduled trial) defendant Josiah, by his attorney, Edward J. Ocean, Esq., filed a motion for dismissal of the prosecution against him on grounds of double jeopardy. The next day defendants Rivera and Rios by their attorneys, Allan Christian, Esq. and Russell Johnson, Esq., joined in the same motion for dismissal on grounds of double jeopardy.

In view of the fact that many government witnesses had been subpoenaed to return to the Virgin Islands, one from Europe and several from the continental United States, and further in view of the fact that the United States Marshals Office made arrangements for at least twelve additional deputy marshals in order to secure the trial and to secure material witnesses pending trial, I found it necessary to set a hearing on the motions forthwith in

order to determine whether there will be trial next Monday or not. For that reason a hearing was held this date, August 1, on the motions to dismiss. After hearing argument of counsel I immediately dictated into the record my decision to deny the motions finding that they were frivolous, absolutely without merit in fact or in law and that they were being made by the attorneys for the purpose of delay only. I made the observation that the matters they complained of occurred several weeks ago, and at that time no objections were taken to the severance from the trial which was proceeded against defendant Elmo Barnes alone. I found it strange that they would make this "eleventh hour" motion knowing that the denial of their motion would give them the delay involved in an immediate and direct appeal.

At the conclusion of my decision and findings the government asked whether or not the defendants plan to appeal. The government had to know in order to avoid the expense of having its witnesses come to the Virgin Islands. Attorney Edward Ocean immediately responded that he did intend to appeal forthwith, and the other attorneys joined in that decision.

The premises considered and for the reasons that I have found the motion to be frivolous, without merit and for the purpose of delay only, I am denying the motions.

DATED: August 1, 1979.

ENTER:

WARREN H. YOUNG
Warren H. Young, Judge

ATTEST:
Edgar D. Ross, Clerk

By:
Deputy Clerk

cc: Edward J. Ocean, Esq.
Allan Christian, Esq.
Russell B. Johnson, Esq.
Douglas Schwarts, Esq.,
Assistant U. S. Attorney

APPENDIX C.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

D. C. No. 1979/49

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff

v.

ELMO BARNES, FLOYD JOSIAH, JUAN RIOS,
LUIS A. RIVERA, and LUCIAN SERRANO,
Defendants

Motion For Severance of Defendants.

Defendant ELMO BARNES, moves for a Severance of his trial from that of his co-defendants and as grounds therefor states:

1. An Affidavit dated May 1, 1979, and signed by Police Officer CARLOS A. RODRIGUEZ provides the paragraph 3(f) as follows:

"That on or about April 10, 1978 Mr. CLAN JACOBS was interviewed at which time he stated that one FLOYD JOSIAH, aka Blackmouth, told him that ELMO BARNES, aka Man Rat, had killed LOUIS M. GOLDEN, JR., said incident taking place at a horse stable on Mr. BARTOLOMEW LEYCOCKS property located in Estate Work & Rest, and that Mr. BARNES was assisted by LUIS ANTONIO RIVERA, aka Tote, and JUAN RIOS, aka Geto."

During the course of trial, defendant ELMO BARNES intends to call as a defense witness the co-defendants to

whom the above remarks are attributed and the other co-defendants who were allegedly present. The testimony of the co-defendants would establish the defendant's innocence of the crime charged. A joint trial of the defendants in this cause would preclude ELMO BARNES from calling the co-defendants as witnesses in light of the constitutional provisions that would unquestionably be invoked by such co-defendants.

Any evidence relating to the participation of the co-defendant ELMO BARNES which may be offered in evidence during the trial would be incompetent and prejudicial as to this defendant.

WHEREFORE, this defendant moves that the Court sever the trial of the defendants herein.

HODGE & SHEEN P. C.
Attorneys for Defendants

By: ALBERT A. SHEEN
Albert A. Sheen, of counsel

DATED: May 16, 1979

Certificate of Service.

IT IS HEREBY CERTIFIED that I caused to be hand delivered a copy of Motion for Severance of Defendants to Douglas Schwartz Esquire, Assistant U. S. Attorney, Hamilton House, Christiansted, St. Croix, V. I.; Edward J. Ocean, Esquire, 26 Company Street, Christiansted, St. Croix, V. I. and Russel B. Johnson, Esquire, King Christian Hotel, Christiansted, St. Croix, V. I. this 17th day of May, 1979.

ALBERT A. SHEEN

APPENDIX D.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CR. No. 49—1979

GOVERNMENT OF THE VIRGIN ISLANDS
Plaintiff

v.

LUIS ANTONIO RIVERA, et al.,
Defendants.

Motion.

COMES NOW, the defendant, LUIS ANTONIO RIVERA, by the undersigned as his attorney of record and moves this Court for an order severing the trial of this defendant from the trial of the other four defendants.

This motion is based upon the records and files herein and upon the following authority: Yesterday, June 11, 1979, the Omnibus hearing was concluded between Ishmael Meyers, U. S. Attorney, Douglas R. Schwartz, Assistant U. S. Attorney, and the undersigned on behalf of this defendant. It was discovered that the theory of the Government's case involves admissions by some, or all, of the other four defendants which, under the following authority, is inadmissible as to this defendant, c.f., Bruton v. United States, 375 F. 2d 355 (1967), 391 U. S. 123 (1968). A sterilizing instruction to the effect that

the jury shall disregard those admissions by other co-defendants cannot be followed by the jury in this case.

DATED: June 12, 1979

RUSSELL B. JOHNSON
Russell B. Johnson
Attorney for Defendant
LUIS ANTONIO RIVERA

Post Office Box 3649
Christiansted, St. Croix
Virgin Islands 00820
Tele: 773-1234

Certificate of Service.

I HEREBY CERTIFY that an accurate copy of the foregoing was by me hand delivered to the offices of the U. S. Attorney at Hamilton House, Christiansted, St. Croix, and placed in the pidgeonholes provided for such purposes at the Office of the Clerk of the District Court to the attention of attorneys: Albert A. Sheen, Esquire; Edward J. Ocean, Esquire; Allan A. Christian, Esquire; and O. S. Lad Mingus, Esquire, for co-defendants, this 12 day of June, 1979.

RUSSELL B. JOHNSON
Russell B. Johnson

APPENDIX E.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CRIMINAL 1979/49

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff

v.

LUCIAN SERRANO et al.,
Defendants

Motion For Severance.

COMES NOW LUCIANO SERRANO, by and through his undersigned attorney, and moves this Honorable Court for an order to sever his trial from the trial of the other defendants within in accordance with the Federal Rules of Criminal Procedure, Rule 14, for the following reasons:

1. Defendant SERRANO's right to a fair and impartial trial is prejudiced by the joinder of offenses and defendants for trial together.

2. Defendant SERRANO's defense will be greatly prejudiced as the crime charged against him is distinct from the crimes charged against the other defendant herein.

3. Should the jury find the other defendants herein guilty, they may tend to find defendant SERRANO guilty by association.

4. Defendant SERRANO will be prejudiced as the jury may find him guilty on the basis of evidence incompetent to establish his guilt but competent to establish the guilt of the other defendants herein.

DATED this 30th day of May, 1979.

O. S. LAD MINGUS
O. S. Lad Mingus
Attorney for Defendant
SERRANO

Order.

Motion denied.

6-1-79

W. H. YOUNG

APPENDIX F.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Criminal No. D. C. 79-49

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff

v.

FLOYD JOSIAH et al.,
Defendants

Motion For Joinder of Defendants.

COMES Now the Government of the Virgin Islands, by Ishmael A. Meyers, United States Attorney for the District of the Virgin Islands, and respectfully moves this Court, pursuant to Rule 8(b), Federal Rules of Criminal Procedure to join defendant LUCIEN SERRANO with defendants FLOYD JOSIAH, JUAN RIOS, AND LUIS A. RIVERA, and try all defendants together on August 6, 1979, and in support of this motion contends that all the above-named defendants participated in the same series of acts or transactions constituting the alleged offenses.

DATED: July 30, 1979.

ISHMAEL A. MEYERS
UNITED STATES ATTORNEY

BY: DOUGLAS R. SCHWARTZ
Douglas R. Schwartz
Assistant U. S. Attorney

Certificate of Service.

I HEREBY CERTIFY that a certified copy of the foregoing Motion was served on opposing counsels, hand delivered:

1. Lad Mingus
   38 Strand Street, Christiansted, St. Croix 00820
2. Russell B. Johnson
   King Christian Hotel, Christiansted, St. Croix 00820
3. Edward J. Ocean
   26 Company Street, Christiansted, St. Croix 00820
4. Allen Christian (via U. S. Mail)
   35 Prince Street, Frederiksted, St. Croix 00820

on this 30th day of July, 1979.

SANDRA B. SINCLAIR
Sandra B. Sinclair
Secretary

Supreme Court, U. S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-905 and 79-916

In the Supreme Court of the United States

OCTOBER TERM, 1979

FLOYD JOSIAH, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

LOUIS ANTONIO RIVERA, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-905

FLOYD JOSIAH, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

No. 79-916

LUIS ANTONIO RIVERA, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the Double Jeopardy Clause bars their retrial following a mistrial granted on their motions.

1. An information filed in the United States District Court for the Virgin Islands charged petitioners and two co-defendants with first-degree murder, kidnapping, conspiracy, and the use of a non-registered firearm in the

commission of a crime of violence in violation of V.I. Code Ann. tit. 14, §§ 921, 922(a)(1), 1051 551(1), 2253(a) and 2254 (1964 and 1978 Cum. Supp.).[1] Before trial petitioner Rivera moved for a separate trial, alleging that he would be denied a fair trial by testimony concerning admissions of his co-defendants that would be inadmissible as to him under *Bruton* v. *United States*, 391 U.S. 123 (1968) (79-916 Pet. Apps. C, D). At a hearing on this motion, the prosecutor advised the court that the government witnesses who were to testify about admissions of a defendant had been instructed not to mention the other defendants' names (79-916 Pet. App. D). The motion for a separate trial was denied.

During trial, a government witness testified about a conversation he had with co-defendant Elmo Barnes (79-905 Pet. 4-5):

"Q. What was the nature of that conversation?

A. * * * I asked him why did he run when he saw both detectives Carlos Rodriguez and Farrelly passing by, and he stated because they are looking for him pertaining to the question of the Luis Golden killing, so I asked him if he was involved in the killing and he said I iced Golden because he messed up some money and a CB radio and some marijuana that belongs to him and the three other defendants.

Q. That he iced him?

A. Yes, sir."

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[1]Another co-defendant also filed a petition for a writ of certiorari; we have waived response to that petition, *Juan Rios* v. *Government of the Virgin Islands*, No. 79-5734. After his mid-trial severence motion was granted, the remaining co-defendant, Elmo Barnes, pleaded guilty to one count of second-degree murder.

Petitioner Rivera immediately objected to this testimony and both petitioners moved for a mistrial based on *Bruton* v. *United States*, *supra*. The court denied the motion at that time (79905 Pet. 7), and the prosecutor was permitted to continue questioning the witness. Thereafter, the witness said he heard co-defendant Rios tell Barnes that the latter should not kill Golden (79-916 Pet. 5-6). At this point, co-defendant Barnes objected and moved for a mistrial or, in the alternative, for a severance (*id.* at 6). The court then reconsidered petitioners' mistrial motions and ruled that a *Bruton* problem that could not be corrected by a cautionary instruction was created by the witness' reference to the "other three defendants" (*id.* at 7-8). In response to an inquiry by the court, petitioners stated that they had moved for mistrials (*id.* at 8). The court ruled that the trial of petitioners and co-defendant Rios would be terminated but that the trial would continue against co-defendant Barnes, for whom no *Bruton* problem existed (*id.* at 9).[2] In characterizing its ruling the court stated (*ibid.*):

> I could call it a mistrial or a severance, it doesn't really matter. I would rather say severance, myself.

2. Before retrial, petitioners and Rios moved to dismiss the charges on double jeopardy grounds. The district court denied the motions in a written order finding them to be "frivolous, absolutely without merit in fact or in law and that they were being made by the attorneys for the purpose of delay only" (79-716 Pet. App. A-2). The court of appeals affirmed (79-716 Pet. App. B). Retrial is currently scheduled to commence on February 25, 1980.

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[2]Barnes then pleaded guilty to one count of second-degree murder.

3. Petitioners' contention that the Double Jeopardy Clause bars their retrial lacks merit. The record shows that both petitioners specifically requested a mistrial (79-916 Pet. 2, 8). When such a motion is made, there is ordinarily no bar to the reprosecution of a defendant since he has retained "primary control over the course to be followed." *United States* v. *Dinitz*, 424 U.S. 600, 607-610 (1976). See *United States* v. *Scott*, 437 U.S. 82, 93 (1978). As this Court stated in *Dinitz*: "[t]he distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause." 424 U.S. at 608. Where a mistrial is requested or consented to by the defendant, it is not necessary that the mistrial be the product of "manifest necessity" *See Arizona* v. *Washington*, 434 U.S. 497 (1978); *Illinois* v. *Somerville*, 410 U.S. 458 (1973).

Petitioner Josiah's assertion (79-905 Pet. 3) that he "did not move for severance" does not preclude a second trial. The fact remains that Josiah requested a mistrial (*id.* at 7). That was a request that petitioner Josiah's trial terminate. Significantly, when the trial court said that it was granting a "mistrial or a severance" and that the Barnes trial would continue, petitioner Josiah did not state that he preferred to remain on trial with Barnes.[3] In any event, even if no request for a mistrial had been made, the judge would have been justified in ending the trial with respect to petitioners in light of the severe

[3]Contrary to petitioner Josiah's assertion (79-905 Pet. 16), the trial court did consider other alternatives, *i.e.* cautionary instructions to the jury, but concluded that they were not adequate (79-916 Pet. 8).

Bruton problem that had developed. *Arizona* v. *Washington*, *supra*, 434 U.S. at 509-510; *Illinois* v. *Somerville*, *supra*, 410 U.S. at 464.

Finally, we recognize that the Double Jeopardy Clause protects a defendant "against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *United States* v. *Dinitz*, *supra*, 424 U.S. at 611. However, nothing in this record suggests conduct by the prosecutor intended to provoke a mistrial "so as to afford the prosecution a more favorable opportunity to convict" the petitioners. *Downum* v. *United States*, 372 U.S. 734, 736 (1963). To the contrary, the prosecutor tried to avoid *Bruton* problems by instructing his witnesses not to mention the names of other defendants when testifying about admissions, and also suggested that this admonition should be repeated by the court (79-916 Pet. App. D2). Indeed, the witness in question never did mention the names of either petitioner when he related the statement of Elmo Barnes. While his reference to the "three other defendants" did create a *Bruton* problem, nothing in the record suggests that this problem should be chargeable to the prosecutor. To the contrary, the prosecution instructed the witness to refer to the defendants merely as "friends" of Elmo Barnes (79-905 Pet. 6). There was no overreaching on the part of the prosecutor. Accordingly, there is no double jeopardy bar to retrial. See *Moroyoqui* v. *United States*, 570 F. 2d 862 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978).[4]

[4]Petitioner Josiah's reliance (79-905 Pet. 18) on *United States* v. *Martin*, 561 F. 2d 135, 140 (8th Cir. 1977), is misplaced. In *Martin* the prosecutor read to the jury irrelevant and prejudicial testimony from a grand jury transcript in contravention of the court's order. The court of appeals described his actions as prosecutorial

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

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overreaching "undertaken to harass or prejudice the defendant" and prohibited reprosecution following a mistrial. In the instant case, however, there is no basis on which to charge any impropriety to the prosecutor.